SUPREME COURT OF KENTUCKY
CASE NO. 2015-SC-000144-D

MARY E. MCCANN, INDIVIDUALLY and ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

APPELLANTS

v.

THE SULLIVAN UNIVERSITY SYSTEM, INC. d/b/a SULLIVAN UNIVERSITY COLLEGE OF PHARMACY, ET AL.

APPELLEE

BRIEF FOR APPELLEE THE SULLIVAN UNIVERSITY SYSTEM, INC. D/B/A SULLIVAN UNIVERSITY COLLEGE OF PHARMACY, ET AL.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served upon the following, by Federal Express, on this the 21st day of March, 2016: Theodore W. Walton, Garry Adams, Clay Daniel Walton & Adams, PLLC, Meidinger Tower, Suite 101, 462 S. Fourth Street, Louisville, Kentucky 40202, *Counsel for Appellant*; Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and Hon. Olu Stevens, Jefferson Circuit Court, Division Six, 700 W. Jefferson Street, Louisville, Kentucky 40202. The undersigned further certifies that Appellee has not withdrawn the record on appeal.

Michelle D. Wyrick

INTRODUCTION

This case involves the proper interpretation of KRS 337.385(2), which specifies who may bring actions for unpaid wages or overtime compensation. The Court of Appeals correctly concluded that KRS 337.385(2), which permits one or more employees to maintain an action for unpaid wages or overtime for or in behalf of himself, herself, or themselves, does not allow class actions or representative claims.

STATEMENT CONCERNING ORAL ARGUMENT

Appellee, The Sullivan University System, Inc. ("Sullivan"), believes that oral argument will be beneficial to the Court in resolving the important legal issues presented by this appeal.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Sullivan does not accept Appellants' statement of the case. Sullivan's counterstatement of the case follows.

A. Admissions Officers

Sullivan employs Admissions Officers at its various colleges, including Sullivan University, Sullivan College of Technology and Design, and Spencerian College, to recruit and enroll prospective students. Admissions Officers contact and conduct preliminary interviews with prospective students to assess whether a prospective student is a good candidate for admission to one of Sullivan's programs [R. 115-116, Def.'s Am. Ans. to Plf.'s Int. No. 9]. They may also advise prospective students about Sullivan's academic programs and degree requirements [R. 115-116, Def.'s Am. Ans. to Plf.'s Int. No. 9; R. 124, Embers Dep., p. 42; R. 127, Hamilton Dep., p. 26]. Based on the student interview, the Admissions Officer determines whether the student is suited for any of Sullivan's programs and whether to recommend any Sullivan programs to the student [R. 116, Def.'s Am. Ans. to Plf.'s Int. No. 10; R. 121-122, Embers Dep., pp. 25-26, 30-31; R. 129, Gast Dep., p. 10]. Admissions Officers have discretion to decide whether to offer a potential student an application/enrollment form [R. 116, Def.'s Am. Ans. to Plf.'s Int. No. 10; R. 129, Gast Dep., p. 13; R. 126, Hamilton Dep., p. 17].

At the time in question, Admissions Officers' work schedules varied widely. Some Admissions Officers were scheduled to work forty hours per week [R. 124, Embers Dep., p. 44]. Others worked less than forty hours per week [R. 139, Gold Dep., p. 25], and some Admissions Officers worked different schedules each week [R. 136, Beasley Dep., p. 24; R. 130, Gast Dep., p. 24]. Moreover, the hours that some Admissions Officers worked varied

depending on the time of year, whether the Admissions Officer worked with adult or high school prospective students, and whether the Admissions Officer was a Local Admissions Officer or a Regional Admissions Officer[1] [R. 104, McCann Dep., p. 13; R. 133, Atchison Dep., p. 29; R. 136, Beasley Dep., p. 24; R. 130, Gast Dep., p. 24].

Regional Admissions Officers determined their own schedules and work patterns [R. 136, Beasley Dep., p. 24]. Their hours varied significantly from week to week [R. 136, Beasley Dep., p. 24; R. 130, Gast Dep., p. 24]. As one Regional Admissions Officer testified, they were "totally different" than other Sullivan employees [R. 132, 134, Atchison Dep., pp. 36, 117].

B. McCann's Employment With Sullivan

Appellant Mary McCann ("McCann") began her employment with Sullivan in March 2006 as the Director of Admissions at Sullivan's campus at Fort Knox, Kentucky [R. 103, McCann Dep., p. 8]. According to McCann, in May 2007, she transferred to Sullivan's Spencerian College campus in Louisville, Kentucky as an Admissions Officer for adult admissions [R. 104-105, *Id.*, p. 9, 16, 18]. Sullivan terminated McCann's employment in April 2008 [R. 1-2, Compl. ¶1].

C. Procedural Background

On February 18, 2010, McCann filed a class and collective action complaint against Sullivan on behalf of herself and all other current or former Admissions Officers employed by Sullivan since February 2005 [R. 1, Compl.]. McCann's complaint, originally filed in

[1] Local Admissions Officers generally worked on campus and conducted student interviews at a Sullivan facility. In contrast, Regional Admissions Officers generally worked at outside locations and met with students at their homes [R. 136, Beasley Dep., p. 24; R. 129, Gast Dep., p. 10].

Jefferson Circuit Court, alleges that Sullivan violated Kentucky's wage and hour laws and the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* ("FLSA") by (1) misclassifying Admissions Officers as exempt employees; and (2) failing to pay Admissions Officers overtime compensation. McCann seeks compensatory and liquidated damages, as well as injunctive relief [R. 17-18, Compl.]. Sullivan removed the action to federal court on March 12, 2010.

On March 1, 2010, Hilda Solis, then Secretary of the United States Department of Labor (the "DOL"), filed a complaint against Sullivan in federal court seeking injunctive relief and back wages under the FLSA on behalf of Admissions Officers, including McCann, and High School Representatives.[2] Sullivan settled the DOL's FLSA claims against it pursuant to the Agreed Order and Permanent Injunction entered on February 28, 2012 [R. 51-60]. As part of the settlement, although Sullivan disputed the DOL's allegations, Sullivan agreed to treat its Admissions Officers as non-exempt employees and to pay Admissions Officers overtime wages in accordance with the FLSA [R. 52-53]. Sullivan also paid back wages to specified Admissions Officers for the time period August 1, 2007 through November 13, 2011 [R. 55].

In the meantime, McCann voluntarily moved to dismiss her FLSA claims against Sullivan [D.E. 9 in *McCann v. The Sullivan University Sys., Inc.,* Civil Action No. 3:10-CV-00165-CRS-DW ("Removed Action")]. McCann's FLSA claims were dismissed by agreed order on October 15, 2010 [D.E. 12 in Removed Action]. McCann's remaining Kentucky state law claims were remanded to the Jefferson Circuit Court on October 3, 2011 [R. 25].

[2] McCann did not bring any claims on behalf of Sullivan's High School Representatives.

McCann did nothing further to prosecute those claims or certify a class until she filed her motion for class certification on October 24, 2013 [R. 34-69, Mot. to Certify Class Action].

On February 27, 2014, the Jefferson Circuit Court denied McCann's motion [R. 189, Order].

> The Plaintiffs have brought this action pursuant to KRS 337.385. Citing the Kentucky Court of Appeals decision in *Toyota Motor Manufacturing Kentucky, Inc. v. Kelly [Kelley]*, 2012-CA-001508-ME, 2013 WL 6046079 (Ky. App., Nov. 15, 2013) ..., Defendant The Sullivan University System maintains KRS 337.385 does not permit certification of class actions. The Court agrees.

[*Id.*]. McCann appealed.

On February 27, 2015, the Kentucky Court of Appeals affirmed the trial court's decision, holding that KRS 337.385 does not authorize class actions. *See McCann v. The Sullivan Univ. Sys., et al.*, 2015 WL 832280 at *3 (Ky. Ct. App., Feb. 27, 2015). Quoting *Toyota Motor Manufacturing Kentucky, Inc. v. Kelley*, 2013 WL 6046079 (Ky. Ct. App., Nov. 15, 2013), the Court of Appeals concluded that "the text of KRS 337.385[(2)] provides a clear expression of intent that class actions are not permitted."[3] *McCann*, 2015 WL 832280 at *3. KRS 337.385(2), which states that actions for unpaid wages and overtime compensation may be maintained by one or more employees "for and in behalf of himself, herself, or themselves,"

> permits more than one person to bring a cause of action under KRS 337.385[(2)] in the same case, but they may do so not in a representative capacity. Further, the effect of the "for and in behalf of" language is to limit the individuals who may participate in an action under the Act to those who actually bring the action.

[3] In 2013, KRS 337.385 was amended, and its sections were renumbered. The phrase "for and in behalf of himself, herself, or themselves" used to appear in KRS 337.385(1) but now appears in KRS 337.385(2).

Id. Thus, "[t]he plain language of KRS 337.385 limits who may maintain an action for unpaid wages. It does not permit representative actions." *Id.* at *5. This appeal followed.

ARGUMENT

The Kentucky Court of Appeals correctly affirmed the Jefferson Circuit Court's decision denying class certification in this action for unpaid overtime under KRS 337.385(2). KRS 337.385(2) provides that "any one (1) or more employees for and in behalf of himself, herself, or themselves" may maintain an action for unpaid wages or overtime compensation. As the Kentucky Court of Appeals correctly concluded, the statute's plain language limits who may maintain such an action and does not permit representative or class actions. The General Assembly used different language ("and other employees similarly situated") in KRS 337.427, Kentucky's Equal Pay Act, when it intended to permit class actions. Moreover, the Kentucky Court of Appeals properly looked to the language of the FLSA, upon which KRS 337.385(2) was modeled, to confirm that KRS 337.385(2) does not allow representative actions. The General Assembly has the authority to limit who may maintain an action for unpaid wages or overtime compensation. This Court should affirm the decision of the Kentucky Court of Appeals and hold that KRS 337.385(2) does not permit class actions.

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT KRS 337.385(2) PROVIDES A CLEAR EXPRESSION OF LEGISLATIVE INTENT THAT CLASS ACTIONS ARE NOT PERMITTED.

The Court of Appeals properly examined KRS 337.385(2)'s statutory language and concluded that employees seeking unpaid wages and overtime compensation may not do so in a class or representative action. "The cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect." *Jefferson County Bd. Of Educ. v. Fell*, 391 S.W.3d 713, 718 (Ky. 2012) (quotations omitted). The Court "first look[s] at the language

employed by the legislature itself, relying generally on the common meaning of the particular words chosen, which meaning is often determined by reference to dictionary definitions." *Id.* at 719 (footnote omitted); *see also Shawnee Telecom Resources, Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011) ("In construing statutes, our goal, of course, is to give effect to the intent of the General Assembly. We derive that intent, if at all possible, from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration.").

When the Kentucky General Assembly chose the language in KRS 337.385(2), it expressed the clear intent to prohibit class actions. In pertinent part, KRS 337.385 states:

> (1) Except as provided in subsection (3) of this section, any employer who pays any employee less than wages and overtime compensation to which such employee is entitled under or by virtue of KRS 337.020 to 337.285 shall be liable to such employee affected for the full amount of such wages and overtime compensation, less any amount actually paid to such employee by the employer, for an additional equal amount as liquidated damages, and for costs and such reasonable attorney's fees as may be allowed by the court.
>
> (2) . . . .Such action may be maintained in any court of competent jurisdiction by any one (1) or more employees **for and in behalf of himself, herself, or themselves.**

(emphasis added).

By using the phrase "for and in behalf of himself, herself, or themselves,"[4] the General Assembly expressly limited who can bring a claim for unpaid wages and overtime compensation.

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[4] As *Amicus Curiae* Kentucky Chamber of Commerce and Kentucky Society for Human Resources Management point out, the pronouns "himself," "herself," and "themselves" are reflexive pronouns. Reflexive pronouns refer to the subject of the sentence or clause. Elaine P. Maimon et al., The New McGraw-Hill Handbook, 537 (2007). Here, the subject is the "one (1) or more employees" who are maintaining an action in court. The pronouns

When Kentucky's General Assembly enacted KRS 337.385,[5] it did not include any language allowing representative or collective actions. Instead, it plainly expressed that an action may only be brought by one or more employees on behalf of himself, herself, or themselves.[6] *See* KRS 337.385(2). It did not permit actions to be brought on behalf of employees who are similarly situated.

"himself," "herself," and "themselves" refer to the "one (1) or more employees" who are maintaining such an action.

[5] KRS 337.385 was enacted in 1974. Its statutory predecessor was KRS 337.360, which was originally enacted in 1938 as part of the Women and Minors' Employment Act. *See Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354, 359-60, 361 (Ky. 2005). KRS 337.360 provided:

> If any woman or minor worker is paid by his employer less than the minimum fair wage to which he is entitled under a mandatory minimum fair-wage order he may recover in a civil action the full amount of the minimum wage less any amount actually paid to him by the employer together with costs and such reasonable attorney's fees as are allowed by the court. Any agreement between him and his employer to work for less than the mandatory minimum fair wage shall be no defense to the action. At the requisition of any woman or minor worker paid less than the minimum wage to which he was entitled under a mandatory order, the commissioner may take an assignment of the wage claim in trust for the assigning employe and may bring any legal action necessary to collect the claim. The employer shall be required to pay the costs and such reasonable attorney's fees as are allowed by the court. The commissioner shall not be required to pay the filing fee, or other costs, in connection with such action.

Id. The General Assembly added the limiting "for and in behalf of " language in 1974, using the FLSA as a model.

[6] McCann argues that the statute's reference to "employees" and "themselves" demonstrates that the legislature intended for class actions to be available under KRS 337.385. As this Court recognized in *Toyota*, KRS 337.385's reference to "one or more employees" merely means that multiple plaintiffs may bring an action for unpaid wages under KRS 337.385. It does not suggest that an employee may bring a representative action. A court may not focus on the words "employees" or "themselves" and ignore the "for and in behalf of " language. *See Jefferson County Bd. Of Educ.*, 391 S.W.3d at 720 ("[S]tatutes should be construed together, should be harmonized where possible and should result in effectiveness of all provisions."). As the Court of Appeals correctly concluded, the "for and in behalf of" language limits who may participate in an action for unpaid wages and overtime compensation to those who actually bring the action.

McCann, 2015 WL 832280 at *3 (footnotes added); *see also Toyota* 2013 WL 6046079 at *9 (construing the unambiguous language of KRS 337.385, which states that an action for violations of Kentucky's wage and hour laws may only be maintained by one or more employees "for and in behalf of himself, herself, or themselves" and concluding that "the text of KRS 337.385[2] provides a clear expression of intent that class actions are not permitted."). An employee may bring a claim in behalf of himself or herself, or more than one employee may join their claims, but an employee may not bring a claim in behalf of an employee who is not participating in the action. Representative or class actions are not permitted.

> The statute permits more than one person to bring a cause of action under KRS 337.385[(2)] in the same case, but they may not do so in a representative capacity. Further, the effect of the "for and in behalf of" language is to limit the individuals who may participate in an action under the Act to those who actually bring the action.

Toyota, 2013 WL 6046079 at *9. Based on this limiting language, the Court of Appeals stated that the trial court improperly certified a class because KRS 337.385 does not permit class actions. *See McCann*, 2015 WL 832280 at *3.

McCann relies on *Califano v. Yamasaki,* 442 U.S. 682 (1979), which held that Fed. R. Civ. P. 23 controlled the availability of class action relief in federal courts absent an "expression" of legislative intent to withhold the same. There, the Court found the language "[a]ny individual" may obtain a review" was not sufficient to preclude class relief. *Id.* at 698-700. McCann argues that there is likewise no expression of legislative intent to withhold the class action remedy under KRS 337.385. Perhaps McCann would have a point if KRS 337.385 referred only to an employee or individual and did not limit actions to be maintained by any one (1) or more employees **for and in behalf of himself, herself, or**

themselves. But KRS 337.385(2) does contain the requisite expression of legislative intent to preclude class actions. The inability to pursue class relief turns upon language limiting employees to filing claims in behalf of themselves (which is not present in *Califano*) and the omission of any reference to "other employees similarly situated."

Based on the text of KRS 337.385, the Kentucky Court of Appeals correctly concluded that KRS 337.385(2) provides a "clear expression of intent that class actions are not permitted." *McCann*, 2015 WL 832280 at *3. "When Kentucky's General Assembly enacted KRS 337.385, it did not include any language allowing representative or collective actions. Instead, it plainly expressed that an action may be only brought by one or more employees on behalf of himself, herself, or themselves. *See* KRS 337.385(2)." *Id.* Moreover it did not refer to "other employees similarly situated." The decision of the Court of Appeals should be affirmed.

II. KRS 337.385 MUST BE INTERPRETED CONSISTENTLY WITH THE REMAINDER OF KRS CHAPTER 337.

The General Assembly's decision not to include language allowing class actions in KRS 337.385(2) must be respected, particularly when the General Assembly included language permitting class actions in a different statute in KRS Chapter 337, KRS 337.427, which prohibits wage discrimination based on sex. "The particular word, sentence or subsection under review must ... be viewed in context rather than in a vacuum; other relevant parts of the legislative act must be considered in determining the legislative intent." *Jefferson County Bd. Of Educ.*, 391 S.W.3d at 719. "[S]tatutes should be construed together, should be harmonized where possible and should result in effectiveness of all provisions." *Id.* at 720. Although the Court "begin[s] with the language that the legislature

chose to use," *id.* at 727, the Court is "obligated to look beyond one word, one phrase, one sentence, even one statute to the language used in other statutes pertaining to the matter in dispute." *Id.* at 727; *see also Shawnee*, 354 S.W.3d at 551 ("We presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes.").

The General Assembly's use of the words "and other employees similarly situated" in KRS 337.427(2) and omission of those words from KRS 337.385(2) demonstrates that the General Assembly did not intend to permit class actions for unpaid wages or overtime compensation. KRS 337.385(2) provides that an "action may be maintained in any court of competent jurisdiction by any one (1) or more employees for and in behalf of himself, herself, or themselves." In contrast, KRS 337.427(2) states that an action an "[a]ction to recover the liability may be maintained ... by any one (1) or more employees for and in behalf of himself, herself, or themselves **and other employees similarly situated.**" KRS 337.427(2) (emphasis added).[7]

The "and other employees similarly situated" language obviously permits a class action.[8] If the General Assembly had intended to permit class actions for wage and hour

[7] Like KRS 337.385(2), KRS 337.427(2) is modeled on 29 U.S.C. §216(b). When it enacted KRS 337.427(2) in 1966, the General Assembly borrowed the "and other employees similarly situated" language from 29 U.S.C. §216(b) but did not include the opt-in requirement. When the General Assembly enacted KRS 337.385(2) in 1974, it did not include either the "and other employees similarly situated" language or the opt-in requirement.

[8] *Amicus Curiae* Kentucky Justice Association argues that the difference in language between KRS 337.385(2) and KRS 337.427(2) could indicate that the General Assembly meant to eliminate collective actions but not class actions under KRS 337.385(2). But, neither KRS 337.385(2) nor KRS 337.427(2) contains opt-in language (like the FLSA includes) required for a collective action. KRS 337.427(2) allows class, but not collective, actions. By omitting the phrase "and other employees similarly situated" when it enacted KRS 337.385(2), the General Assembly indicated that it did not intend to allow class actions under KRS 337.385(2).

violations, it could have used the same language it used when it enacted KRS 337.427, which was enacted eight years earlier. The General Assembly was clearly aware of the phrase "and other employees similarly situated." Its omission from KRS 337.385(2) and its inclusion in KRS 337.427 demonstrates that the General Assembly did not intend to permit class actions under KRS 337.385(2).

In *Davenport v. Charter Communications, LLC*, 35 F. Supp. 3d 1040 (E.D. Mo. 2014), the court compared the language of KRS 337.385(2) ("Such action may be maintained in any court of competent jurisdiction by any one (1) or more employees for and in behalf of himself, herself, or themselves.") with language in KRS 337.427(2) ("Action to recover the liability may be maintained in any court of competent jurisdiction by any one (1) or more employees for and in behalf of himself, herself, or themselves and other employees similarly situated.). "These provisions cannot be considered in isolation but must be construed together, as part of one statutory scheme." *Id.* at 1048.

> Read together, the plain language of the statute suggests that, for wage discrimination actions, the Kentucky legislature intended to permit employees to sue in both an individual capacity in behalf of themselves and a representative capacity in behalf of similarly situated employees. But for overtime actions, ... the legislature intended to permit employees to sue only in an individual capacity. ... [T]he Kentucky legislature enacted the overtime liability provision eight years after it enacted the provision governing wage discrimination actions. *See* Ky. Rev. Stat. §337.385 (enacted 1974); §337.427 (enacted 1966). Had the legislature intended to permit employees to bring overtime actions in a representative capacity, it would have included the "similarly situated" language it included in the wage discrimination provision.

Id.

In the past, when this Court has been called upon to consider two statutes in the same Chapter that contain different language, the Court has respected the differences in language chosen by the General Assembly. In *Kentucky Department of Corrections v.*

McCullough, 123 S.W.3d 130 (Ky. 2003), this Court considered whether punitive damages were available for employment discrimination under the Kentucky Civil Rights Act. KRS 344.660 and KRS 344.665 permitted recovery of "punitive damages" for housing discrimination. In contrast, KRS 344.450 permitted recovery of "actual damages sustained" for employment discrimination. The *McCullough* Court concluded that punitive damages were not available under KRS 344.450, holding that "in construing statutes it must be presumed that the Legislature intended something by what it attempted to do." *Id.* at 140. Just as the General Assembly's choice not to include "punitive damages" in KRS 344.450 and to limit recoveries to "actual damages sustained" showed that punitive damages were not available in employment discrimination actions, the General Assembly's choice not to include "and other employees similarly situated" and to include the limiting language "for and in behalf of himself, herself, or themselves" shows that the General Assembly did not intend to allow class actions for wage and hour violations. Consequently, the decision of the Court of Appeals should be affirmed.

III. THE COURT OF APPEALS PROPERLY CONFIRMED THE LEGISLATURE'S INTENT THAT KRS 337.385 DOES NOT PERMIT CLASS ACTIONS BY LOOKING TO LEGISLATIVE HISTORY.

The Court of Appeals appropriately compared the language in KRS 337.385 with the language in the FLSA, upon which KRS 337.385 is modeled, and concluded that KRS 337.385 does not permit representative actions. "Where [a] statute is ambiguous, the Court may properly resort to legislative history." *Jefferson County Bd. of Educ.*, 391 S.W.3d at 719. "Often legislative history is referenced, even where a statute is unambiguous, simply to underscore the correctness of a particular construction." *Id.* at 720. The Court may also look to similar statutes and interpretations of those statutes where a statute is

plainly based on similar legislation. *See Brown v. Commonwealth*, 40 S.W.3d 873, 876 (Ky. 1999); *Schmitt Furniture Co., Inc. v. Com. by and on behalf of Gillis*, 722 S.W.2d 889, 891 (Ky. 1987) (looking to the Federal Equal Access to Justice Act, 28 U.S.C.A. Sec. 2412, and related federal decisions to construe KRS 453.260). The General Assembly's omission from KRS 337.385 of FLSA's "or other employees similarly situated" language confirms that it did not intend for employees to bring class or collective actions under KRS 337.385.

Section 216(b) of the FLSA provides in relevant part:

> An action to recover the liability prescribed ... may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves **and other employees similarly situated.** No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

(emphasis added). When the General Assembly enacted KRS 337.385 in 1974, it borrowed language from the FLSA, but it expressly omitted any reference to "and other employees similarly situated."

As the Court of Appeals recognized, "[t]he language in KRS 337.385 contrasts sharply with FLSA's language, which expressly permits plaintiffs to bring claims for wage and hour violations 'on behalf of himself or themselves or **other employees similarly situated.**' 29 U.S.C. § 216(b) (emphasis added)." *McCann*, 2015 WL 832280 at *3. Although the General Assembly could have included words such as "other employees similarly situated" or simply said that an employee may maintain an action against an employer, it did not do so. By using the "for and in behalf of himself, herself, or themselves" language, it limited those individuals who may maintain an action for unpaid wages and overtime compensation to those who actually bring the action.

McCann's argument that KRS 337.385(2) did not have to refer to class actions when it was enacted in 1974 because class action rules already existed in Kentucky and that the FLSA, in contrast, had to provide expressly for group actions because Fed. R. Civ. P. 23 had not yet been enacted is incorrect. KRS 337.385 was based on a preexisting statute that was enacted in 1938, before the modern form of CR 23 was enacted in 1969. KRS 337.385(2)'s limiting language was not adopted until 1974. By including the "for and in behalf of language," the General Assembly chose not to allow representative actions. McCann's interpretation of the KRS 337.385(2) would simply ignore that part of the statute. Likewise, although Fed. R. Civ. P. 23 was revised in 1966, rules governing class actions under federal law have long been in existence. See 1 Newberg on Class Actions §1:14 (5th ed. 2011) (noting that original Rule 23 was enacted in 1938 and "represented a substantial restatement of former Equity Rules 38 (representative of class) and 27 ...."). Congress amended the FLSA in 1947, abolished the representative action by plaintiffs not possessing claims, and added the requirement that an employee file a written consent "[i]n part responding to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome." *Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989). "Congress left intact the 'similarly situated' language providing for collective actions." *Id.*[9]

The General Assembly's decision not to borrow the "and other employees similarly situated" and to adopt the limiting "for and in behalf of himself, herself, or themselves" language evidences an intent not to allow class or representative actions under KRS

[9] As originally enacted in 1938, private actions under the FLSA could be brought "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees [could] designate an agent or representative to maintain such action for and in behalf of all employees similarly situated." *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 254 (3d Cir. 2012).

337.385. "This contrasting language [between KRS 337.385(2) and 29 U.S.C. §216(b)] indicates that the Kentucky General Assembly did not inten[d] to permit class actions under KRS 337.385." *Anderson v. GCA Servs. Group of N.C., Inc.*, 2015 WL 5299452 at *2 (W.D. Ky. Sept. 9, 2015). "Wage and hour claims are not viable class actions under Kentucky law." *Id.* The Court should affirm the decision of the Court of Appeals.

IV. THE GENERAL ASSEMBLY HAS THE AUTHORITY TO LIMIT WHO MAY BRING AN ACTION FOR UNPAID WAGES AND OVERTIME COMPENSATION.

Under longstanding precedent, the General Assembly has the authority to delineate a statutory right and corresponding remedy as it did in KRS 337.385(2). "[W]here a right is given by statute and a liability which did not exist at common law is created, the method . . . provided by the statute for the enforcement of the right is exclusive and must be strictly pursued." *Hawkins v. Dep't of Welfare*, 197 S.W.2d 98, 99 (Ky. 1946); *see also Grzyb v. Evans*, 700 S.W.2d 399, 401 (Ky. 1985) ("[w]here the statute both declares the unlawful act and specifies the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute.") KRS 337.385 creates a statutory right and remedy for unpaid wages and overtime compensation.

In particular, KRS 337.385(1) specifies that

> any employer who pays any employee less than wages and overtime compensation **to which such employee is entitled under or by virtue of KRS 337.020 to 337.285 shall be liable to such employee affected for the full amount of such wages and overtime compensation, less any amount actually paid to such employee by the employer, for an additional equal amount as liquidated damages, and for costs and such reasonable attorney's fees as may be allowed by the court.**

(emphasis added). The General Assembly has the authority to designate who may maintain such an action. *See, e.g., Wheeler v. Hartford Acc. & Indem. Co.*, 560 S.W.2d 816, 819 (Ky.

1978) (where a statute mandates that a wrongful death action be "maintained by the personal representative of the deceased," "the right of action is in the personal representative exclusively"). Because KRS 337.385 provides that a wage and hour action must be maintained by an employee or employees, and not by their representatives, that right of action lies with the individual employee or employees exclusively.

Despite KRS 337.385's limiting language, McCann argues that class actions are available because CR 1 states that Kentucky's Rules of Civil Procedure govern procedure and practice in all civil actions. Therefore, McCann argues, CR 23 should apply to actions under KRS 337.385. "The language in KRS 337.385 specifying who has standing to pursue an action for unpaid wages, however, is not a mere procedural provision." *McCann*, 2015 WL 832280 at *4; *see also Harris v. Reliable Reports, Inc.*, 2014 WL 931070 at *8 (N.D. Ind. 2014) (holding that an opt-in provision enacted as part of state wage and hour laws conferred substantive rights); *Siegel v. Novak*, 920 So. 2d 89, 94 (Fla. Dist. Ct. App. 2006) ("[T]he question of standing to assert a claim is analogous to a statute of limitations defense. Both issues relate to whether a cause of action may proceed; neither involves the 'machinery for carrying on the suit' once the right to proceed has been determined. The ability to bring an action at law is a 'most valuable attribute' of a legal right, a factor favoring the classification of standing as a substantive matter."); *Pyro Mining Co. v. Kentucky Comm'n on Human Rights*, 678 S.W.2d 393, 396 (Ky. 1984) ("There is no doubt in our minds that CR 23 involves matters of substance as well as procedure.").

KRS 337.385(2)'s limitation on representative actions defines the scope of substantive rights under the Kentucky Wages and Hours Act. In *Davenport v. Charter Communications, LLC*, 35 F. Supp. 3d 1040 (E.D. Mo. 2014), the court considered whether

the United States Supreme Court's decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010),[10] required it to apply Fed. R. Civ. P. 23 and permit plaintiffs to pursue a class action under KRS 337.385. The *Davenport* Court held that it could certify a class under KRS 337.385.

"The Court concludes that the class action restriction in Section 337.385 of the Kentucky Act is 'so intertwined' with that statute's rights and remedies that applying Rule 23 in its stead would 'abridge, enlarge or modify' a substantive right in violation of the Rules Enabling Act." *Davenport*, 2014 WL 3818377 at *7. "In applying Justice Stevens' approach,[11] particularly with regard to determining whether a state law is so 'intertwined with a state right or remedy that it functions to define the scope of the state-created right,' courts have looked to whether the limiting provision is found within the text of a state statute that confers a substantive right and applies only to cases brought under the statute." *Id.* at *6 (footnote added).

> Unlike the New York law at issue in *Shady Grove*, the Kentucky Act's class action restriction is found within the very statutory provision that authorizes a private right of action for unpaid overtime wages .... The class action restriction in Section 337.385 functions to define the scope of Plaintiffs' substantive rights under the Kentucky Act; therefore, Rule 23 does not apply.

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[10] *Shady Grove* addressed the question of whether a state statute prohibiting class actions in suits seeking penalties or statutory minimum damages precluded "a federal district court sitting in diversity from entertaining a class action under Federal Rule of Civil Procedure 23." *Shady Grove*, 130 S. Ct. at 1436.

[11] Given *Shady Grove*'s fractured majority and the 4-1-4 split in the opinions, Justice Stevens' concurrence is the controlling opinion because "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *United States v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)). *See Davenport*, 2014 WL 3818377 at *6 ("the majority of federal courts to consider the issue have found that Justice Stevens' opinion [in *Shady Grove*] controls").

Id. at *7. Accordingly, the Kentucky Court of Appeals correctly concluded that "KRS 337.385's limitation on the parties that may bring claims for unpaid wages is contained in a substantive statute and is intertwined with the statute's rights and remedies." *McCann*, 2015 WL 832280 at *5. "CR 23 does not apply to claims brought under KRS 337.385." *Id.*

Indeed, Kentucky courts have long recognized that the General Assembly has the authority to specify whether a statutory remedy may be pursued as a class action. For example, in *City of Somerset v. Bell*, 156 S.W.3d 321 (Ky. App. 2005), the Court of Appeals cited cases interpreting KRS 134.590(6) and its predecessor statute as not allowing for class relief under the ad valorem tax refund statute because it provided that "[n]o refund shall be made unless application is made **in each case** within two (2) years from the date payment was made." (emphasis in original). When the General Assembly amended the statute in 1996 to delete the words "in each case," the court concluded that, as amended, the statute now permitted class actions. *Id.* at 326.

> Considering the historical significance of that phrase [in each case], ... we must conclude that the intent of the legislature was to amend that portion of the statute limiting refunds for ad valorem taxes to individual claims. Even if the change was unintentional, its effect was to alter key language of a statute, which, for some seventy years before the amendment, had been interpreted by the courts to limit tax refunds to individual claims.

Id. at 326-27. The court determined the availability of class relief solely by reference to the statute, not by reference to CR 23 or CR 1.

Although this Court has previously determined that "CR 23 involves matters of substance as well as procedure," *Pyro Mining Co.*, 678 S.W.2d at 396, even if the Court were to reverse course and find that CR 23 is purely a procedural rule, KRS 337.385 can be treated as a special statutory proceeding. *See Swift & Co., Inc. v. Campbell*, 360 S.W.2d 213, 214 (Ky. 1962) (holding that the distress remedy in KRS 383.010(1), which provided that

"[r]ent may be recovered by distress, attachment or action, and shall bear six percent interest per annum from the time it is due," was a special statutory proceeding); *Ogden v. Beverly*, 2013 WL 5521576 at *1 (Ky. App. Oct. 13, 2013) (holding that an action to quiet title is a special statutory proceeding where that statute provides that "[a]ny person having both the legal title and possession of land may prosecute suit, by petition in equity, in the circuit court of the county where the land or some part of it lies, against any other person setting up a claim to it. If the plaintiff establishes his title to the land the court shall order the defendant to release his claim to it and to pay the plaintiff his costs, unless the defendant by his answer disclaims all title to the land and offers to give such release to the plaintiff, in which case the plaintiff shall pay the defendant's costs, unless for special reasons the court decrees otherwise respecting the costs."). Similarly, KRS 337.385(1) provides that

> any employer who pays any employee less than wages and overtime compensation to which such employee is entitled under or by virtue of KRS 337.020 to 337.285 shall be liable to such employee affected for the full amount of such wages and overtime compensation, less any amount actually paid to such employee by the employer, for an additional equal amount as liquidated damages, and for costs and such reasonable attorney's fees as may be allowed by the court.

KRS 337.385(2) specifies that an action to recover unpaid wages or liquidated damages may only be "maintained in any court of competent jurisdiction by any one (1) or more employees for and in behalf of himself, herself, or themselves." The statute's limitation on who may bring an action under the Kentucky Wages and Hours Act is inconsistent with CR 23, which allows class actions. *See Pyro Mining Co.*, 678 S.W.2d at 396 (holding that where a statute only permits a "complainant" — i.e., a singular person — to bring a charge before the Kentucky Commission on Human Rights, that statute was inconsistent with CR 23 and expressed the Legislature's clear intent to preclude class actions in such proceedings).

Under CR 1, procedural requirements in a statute take precedence over a conflicting rule. *See Batts v. Illinois Cent. R.R. Co.*, 217 S.W.3d 881, 884 (Ky. App. 2007). CR 23 cannot override KRS 337.385's limitation on who may bring claims for unpaid wages.[12]

McCann also invokes Kentucky Constitution §116 to suggest that an interpretation of KRS 337.385 precluding class actions would be invalid. If McCann intended to challenge the constitutionality of KRS 337.385, she is barred from doing so because she failed to notify the Attorney General of any purported constitutional attack on the statute. *See Maney v. Mary Chiles Hosp.*, 785 S.W.2d 480, 482 (Ky. 1990).

In any event, it is McCann's burden to affirmatively establish that KRS 337.385 is a statute governing procedure in the courts and therefore beyond the authority of the General Assembly to enact. *See Dunlap v. Commonwealth*, 435 S.W.3d 537, 573 (Ky. 2013) (upholding statute containing burden of proof against constitutional attack under Ky. Const. §116 where Kentucky courts have variously described burdens of proof as substantive or procedural). In light of the long history of the General Assembly determining when a remedy may be pursued as a class action and this Court's description

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[12] McCann's argument that KRS 337.395 indicates that wage and hour class actions are permitted because the ability to maintain a class action is a standard "relating to minimum wages, maximum hours, overtime compensation, or other working conditions in effect under any other law of this state" is flawed. McCann cites no case law to support her contention that CR 23 is a standard that relates specifically to minimum wages, maximum hours, or overtime compensation. KRS 337.395 has nothing to do with class actions. Instead, it was intended to preserve any more favorable minimum wage, maximum hours or overtime laws only until they were superseded by "operation of or in accordance with KRS 337.275 to 337.325, 337.345, and 337.385 to 337.405 or regulations issued thereunder." KRS 337.395. *Bridges v. F.H. McGraw & Co.*, 302 S.W.2d 109 (Ky. 1957), cited by McCann, does not suggest that the ability to maintain a class action is a standard that was meant to be preserved under KRS 337.395. *Bridges* simply allowed employees to bring a class action for travel pay alleged to be owed under a collective bargaining agreement under Kentucky's existing class action rule. *See id.* at 114. It had nothing to do with minimum wages, maximum hours, overtime compensation, or any other statute.

of CR 23 as involving matters of substance and procedure, McCann cannot meet her burden. Where there is a "gray area in which a line between the legislative prerogatives of the General Assembly and the rule-making authority of the courts is not easy to draw," *Dunlap*, 435 S.W.3d at 574 (quotations omitted), "[t]he policy of this court is not to contest the propriety of legislation in this area to which we can accede through a wholesome comity." *Id.* (quotations omitted). The General Assembly did not exceed its rule-making authority in enacting KRS 337.385(2).

V. CLASS ACTIONS ARE NOT NECESSARY TO ACHIEVE ANY LEGISLATIVE GOAL UNDER KENTUCKY'S WAGE AND HOUR STATUTES.

Although McCann cites cases that have certified classes under KRS 337.385, until *Toyota*, no Kentucky case appears to have considered the issue of whether the limiting language in KRS 337.385 precludes class actions.[13] McCann argues, with no support in case law or legislative history, that Kentucky's Wages and Hour Act was intended to protect plaintiffs from "predatory employers" [Br. at 11] and that class actions achieve this goal by providing employees with easy and efficient access to the courts and counsel.[14] "McCann ignores the fact that Kentucky law provides effective and inexpensive administrative remedies to resolve claims

[13] Even though the issue has not been raised previously, that does not mean that the Court should continue to allow class actions to be certified under KRS 337.385. Employers were subjected to punitive damage awards before this Court decided *Kentucky Department of Corrections v. McCullough*, 123 S.W.3d 130 (Ky. 2003) and held that punitive damages are not available in employment discrimination actions under KRS Chapter 344.

[14] McCann cites *Beattie v. CenturyTel, Inc.*, 511 F.3d 554 (6th Cir. 2007), in support of her contention that class actions should be allowed so that plaintiffs can aggregate claims and prevent employers from defeating the central purpose of Kentucky's wage and hour laws by "cheat[ing]" employees out of rightfully earned wages [Br. at 11]. *Beattie* is not a wage and hour case. It is a suit involving claims under the Federal Communications Act, the Truth-in-Billing Act, and Michigan's Consumer Protection Act.

for unpaid wages." *McCann*, 2015 WL 832280 at *5. "Kentucky's wage and hour law authorizes the Kentucky Labor Commissioner to investigate and remedy wage payment violations. *See* KRS 336.050, 337.310, 337.385. The Commissioner may also bring civil actions on behalf of employees with valid wage claims. *See* KRS 337.385(4)." *Id.* KRS 337.385(4) provides:

> At the written request of any employee paid less than that amount to which he or she is entitled under the provisions of KRS 337.020 to 337.285, the commissioner may take an assignment of such wage claim in trust for the assigning employee bring any legal action necessary to collect such claim, and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court. The commissioner in case of suit shall have power to join various claimants against the same employer in one (1) action.

There is no minimum claim threshold for pursuing wage collection claims with the Labor Cabinet. The claims of any putative class members who are truly aggrieved can be adequately pursued in the Labor Cabinet or in individual actions. Employees may also pursue claims under the FLSA, as McCann did.

As the Court of Appeals recognized, "[c]lass actions are not necessary to achieve any legislative goal under Kentucky's wage and hour statutes." *McCann*, 2015 WL 832280 at *5. The plain language of KRS 337.385, which does not permit representative actions, should be enforced.

McCann and some *Amici Curiae* argue that a decision precluding class actions under KRS 337.385 would be inconsistent with decisions permitting wage and hour class actions in other jurisdictions. None of the cases and statutes they cite, however, contain the same limiting language that KRS 337.385(2) includes. *See, e.g.*, 820 Ill. Comp. Stat. Ann. 105/12(a) ("[I]f any employee is paid by his employer less than the wage to which he is entitled under the provisions of the Act, the employee may recover in a civil action the

amount of any such underpayments"); Iowa Code Ann. §91A.8 ("[W]hen it has been shown that an employer has intentionally failed to pay an employee wages ..., the employer shall be liable to the employee for any wages or expenses..."); Minn. Stat. Ann. §181.171 ("[A] person may bring a civil action seeking redress for violations ... directly to district court"); N.Y. Lab. Law §663(1)("[I]f any employee is paid by his or her employer less than the wage to which he or she is entitled under the provisions of this article, he or she shall recover in a civil action the amount of any such underpayments."); Wash. Rev. Code Ann. §49.46.090(1) ("[a]ny employer who pays any employee less than wages to which such employee is entitled under or by virtue of this chapter, shall be liable to such employee affected for the full amount of such wage rate"); *Reynolds v. Bement*, 116 P.3d 1162 (Cal. 2005) (addressing the question of "whether plaintiff has stated a cause of action against any of eight individuals who were officers or directors and shareholders of the Delaware corporation, or its California subsidiary, that owns the automobile painting business for which he formerly worked" under Cal. Lab. Code §1194(a), which provides that "any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."), abrogated on other grounds by *Martinez v. Combs*, 231 P.3d 259 (Cal. 2010); *Scott v. Aetna Servs., Inc.* 210 F.R.D. 261 (D. Conn. 2002) (construing Conn. Gen. Stat. Ann. §31-68(a), which provides "[i]f any employee is paid by his or her employer less than the minimum fair wage or overtime wage to which he or she is entitled ... he or she shall recover, in a civil action.").

McCann specifically refers to New Hampshire's statute, N.H. Rev. Stat. Ann. §275:53(I), which states that an "[a]ction by an employee to recover unpaid wages and/or liquidated damages may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves, or such employee may designate an agent or representative to maintain such action." Unlike KRS 337.385(2), New Hampshire's statute includes language allowing employees to designate an agent or representative to maintain an action. In *Garcia v. E.J. Amusements of N.H., Inc.*, 98 F. Supp. 3d 277, 284 (D. Mass. 2015), the court specifically stated that the statutory language "broaden[e]d the class of persons who may bring specified suits to include designated agents or representatives." There is no similar language in KRS 337.385(2).

CONCLUSION

The Kentucky Court of Appeals correctly concluded, based on the plain language of KRS 337.385(2), that an employee may not pursue a class or representative action under Kentucky's Wages and Hours Act. KRS 337.385 does not allow representative actions but instead, by using the language "for and in behalf of himself, or themselves," limits the individuals who may maintain an action to those who actually bring the action. The General Assembly used different language ("and other employees similarly situated") in KRS 337.427, when it intended to permit class actions. The Kentucky Court of Appeals properly examined the language of the FLSA, upon which KRS 337.385(2) was based, and confirmed that KRS 337.385(2) does not allow representative actions. The General Assembly has the authority to limit who may maintain an action for unpaid wages or overtime compensation. Accordingly, this Court should affirm the decision of the Kentucky Court of Appeals and hold that KRS 337.385(2) does not permit class actions.

Respectfully submitted,

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APPENDIX

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